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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JUL 27 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Clark-Bader, Inc., d/b/a)
TMC Long Distance,)
)
Complainant,)
)
V.)
)
Pacific Bell Telephone Company,)
)
Defendant)

CC Docket No. 93-161
File No. E-89-85

To: The Honorable Walter C. Miller
Administrative Law Judge

MOTION FOR CLARIFICATION AND/OR ENLARGEMENT OF ISSUES

Complainant Clark-Bader, Inc. d/b/a TMC Long Distance ("TMC"), by its attorneys, and pursuant to section 1.229(a) of the FCC's Rules, hereby moves the Presiding Judge for an order clarifying and/or enlarging, if necessary, the issues upon which the hearing was ordered, as set forth in the Hearing Designation Order ("HDO") released on June 23, 1993.^{1/} In support whereof, the following is shown.

1. The HDO specifies that the following issues are to be heard in this proceeding:

1. To determine the facts and circumstances surrounding Pacific's provision of interstate access services to TMC during the period covered by the complaint.

2. To determine whether Pacific engaged in unjust and unreasonable practices and/or charged unjust and unreasonable rates in violation of Section 201(b) of the Communications Act in connection with its provision of

^{1/}A summary of the HDO was published in the Federal Register on July 12, 1993. 58 Fed. Reg. 37481 (July 12, 1993).

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interstate access services to TMC during the period covered by the complaint.

3. To determine whether Pacific engaged in unjust and unreasonably discriminatory practices and/or charged unjust and unreasonably discriminatory rates in violation of Section 202(a) of the Communications Act in its provision of interstate access services to TMC during the period covered by the complaint.

4. To determine, in view of the evidence adduced on the foregoing issues, whether and if so, in what amounts, Pacific should be required to pay monetary damages to TMC.

5. To determine, in view of the evidence adduced on the foregoing issues, whether TMC is entitled to an award of prejudgment interest on any damages recovered in this proceeding.

2. The Prehearing Order issued by the Presiding Judge on June 28, 1993^{2/} notes that the Acting Chief, Common Carrier Bureau designated a 47 USC 201(b) just and reasonable issue, and a 47 USC 202(a) unjust and unreasonable discrimination issue for hearing. PHO, para. 3. The Order also indicates that "counsel should be prepared to discuss any other questions about clarification of existing issues." PHO, at para. 8. A Prehearing Conference has been scheduled for September 21, 1993.

3. TMC is filing this Motion to Clarify at this time because of the procedural history of this proceeding. TMC's complaint was filed over four years ago, in February, 1989. Numerous status conferences were held between TMC, the Defendant, and the Common Carrier Bureau's Enforcement Division. At the last such status conference, which was held in July 1992, the Chief of the Common Carrier Bureau's Formal Complaints and Investigations Branch,

^{2/}Prehearing Order, CC Docket No. 93-161, FCC 93M-426 (rel. June 30, 1993 (hereafter "PHO")).

Thomas Wyatt (hereafter "Chief"), represented to the parties that the complaint would be designated for an evidentiary hearing, and solicited the parties' input on formulating the issues to be heard. It was then agreed that counsel for TMC and the Defendant would work together to draft up a list of mutually-agreed upon issues, that would be submitted to the Chief for inclusion in the hearing designation order.

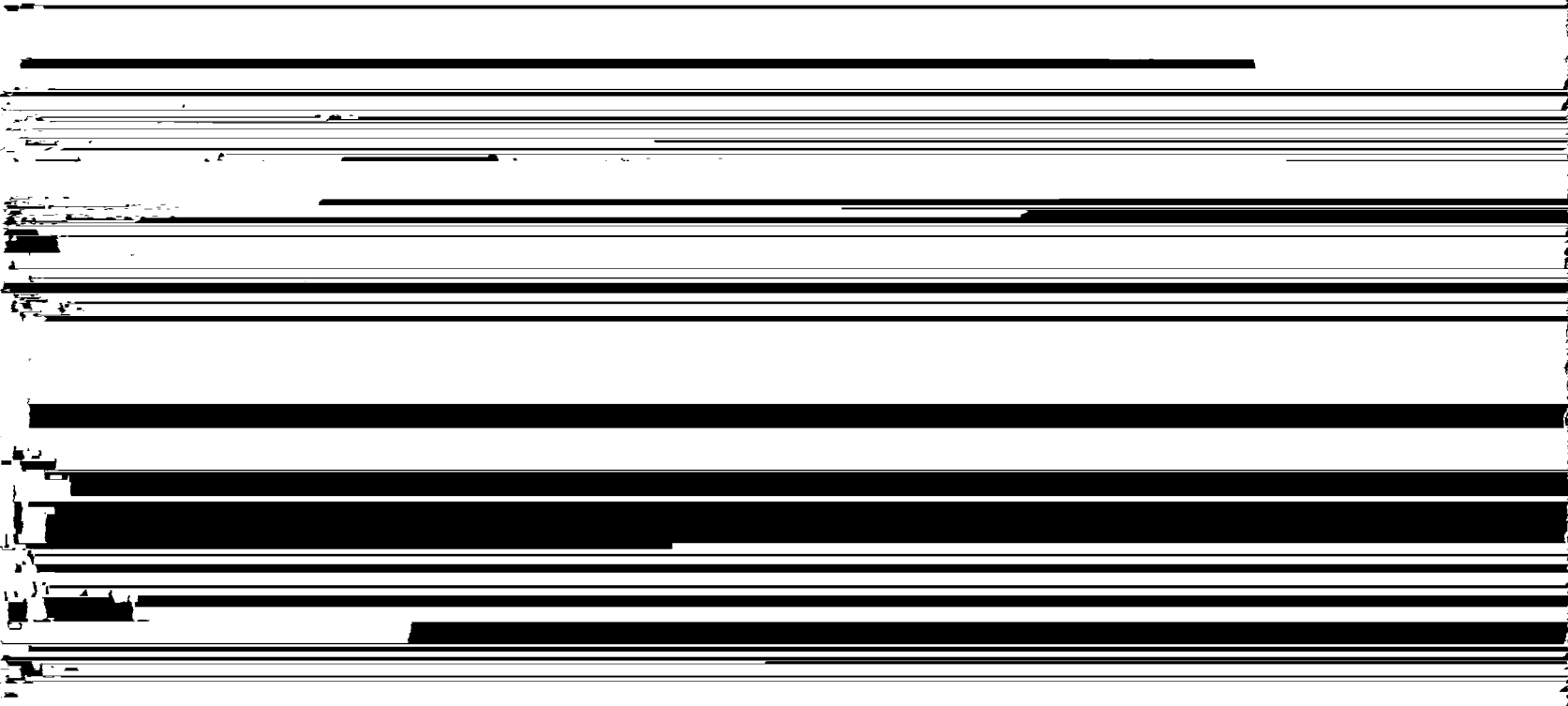
4. Counsel for TMC and PacBell agreed upon a list of issues

6. To determine, in view of the evidence adduced on the foregoing issues, whether and if so, in what amounts, PacBell should be required to pay monetary damages to

of the Bureau that the issue of equal access be included in the 201(b) and 202(a) issues, and that the issue of PacBell's wilful misconduct also is encompassed within the issues as designated.

7. Notwithstanding the Chief's concurrence with TMC's interpretation, given the procedural posture of this case, which requires that TMC submit its direct case on all of the designated issues during the September 21, 1993 Prehearing Conference, it is essential that the Presiding Judge be fully informed on this important matter in order that a formal or informal clarification may be made that the issues of equal access and wilful misconduct are encompassed within the hearing issues as presently framed. In the alternative, if the Presiding Judge deems it more procedurally appropriate, TMC moves to enlarge the issues to include Proposed Issues 2 and 5 as stated above in paragraph 4 herein.

8. The issues of PacBell's compliance with its equal access obligations and whether PacBell acted with wilful misconduct were raised by TMC in its formal complaint as initially filed, and have



9. During the time period in issue in this complaint (1985-1988), which is the time period during which equal access services were first provided to competitive interexchange carriers such as TMC by the local exchange carriers, the ability of a competitive carrier to obtain access services equal to that provided to TMC

"stand-alone" basis. What TMC has undertaken to prove, and what it will prove, is not only that Pacific Bell failed to comply with the broader mandates of Section 201 and 202, but also with its more specific and unique obligation to provide TMC with access services that were equal in quality to that provided to AT&T.

11. As TMC has been given the burden of proof and the burden of proceeding on the section 201(b) and 202(a) issues, it is

EXHIBIT 1

2-1C17A

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September 15, 1992

GALLAND, KHARASCH, MORSE & GARFINKLE, P. C.

Nancy Woolf, Esq.
September 15, 1992
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requirements for independent telephone companies.

Therefore ... we endorse the features of equal access services that have been set forth in the MFJ and CD [GTE's Consent Decree] as being equally valid in their application to the services we are requiring the ITCs to implement in this Order. (Id. at ¶ 59)

The Commission expressly sought to make sure that insofar as equal access obligations were concerned, whether arising from the MFJ or its own policies, there should be no mistaken notion that the FCC was not fully supportive of and determined to enforce the equal access requirement fundamental to competition in the interexchange marketplace at this crucial developmental stage of that competition.

TMC therefore had a right to equal access to that made available by Pacific Bell to AT&T under expressed FCC policy as documented herein. TMC need not and is not relying on the MFJ with respect to this issue and the issue is one proper for determination at hearing.

If you now agree, we may submit the attached revised list to the FCC.

Respectfully,


Charles H. Helein

cc via fax:
Thomas D. Wyatt, Esq,
FCC Enforcement Division

1. To determine the facts and circumstances surrounding PacBell's provision of interstate access services to TMC during the period from 1985 through 1988.

2. To determine whether the access services PacBell provided during the period from 1985 through 1988 failed to provide access equal to that provided to AT&T in the San Diego LATA.

3. To determine whether PacBell engaged in unjust and unreasonable practices in violation of Section 201(b) and in unjust or unreasonable discrimination in violation of Section 202(a) of the Communications Act in connection with its provision of interstate access services to TMC during the period from 1985 through 1988.

4. To determine whether PacBell engaged in violations of Section 203 of the Communications Act by billing and collecting charges for premium Feature Group D access services for the access services provided to TMC during the period from 1985 through 1989.

5. To determine whether Pacific Bell acted with wilful misconduct in the actions it took and the policies it followed in
regarding local exchange access to TMC during the period from

CERTIFICATE OF SERVICE

I Julia A. Waysdorf, certify that I have this 27 day of July, I sent by regular, first-class mail, postage prepaid, a copy of the foregoing "Motion for Clarification and/or Enlargement of Issues" to:

James P. Tuthill, Esq.
Nancy C. Woolf, Esq.
Pacific Bell
140 New Montgomery Street, Room 1530-A
San Francisco, CA 94105

and via hand delivery to:

Thomas D. Wyatt, Esq.
Chief
Formal Complaints and Investigation Branch
Federal Communications Commission
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Julia A. Waysdorf